No. 06-963

IN THE

Supreme Court of the United States

CHRISTOPHER D. VAUGHAN,

Petitioner,

v.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS DEBORAH CONNER, ANTONIO ELZO, AND FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

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I

INTRODUCTION

Petitioner, Christopher D. Vaughan ("Vaughan"), has not demonstrated a sufficient basis for invoking this Court's very narrow certiorari jurisdiction. This Court has already examined and crafted the law regarding the primary issue presented in his Petition—the parameters of qualified immunity afforded a government official—and Vaughan does not demonstrate that Florida's Fourth District Court of Appeal or the Florida Supreme Court has failed to apply federal or constitutional law correctly.

The Fourth District Court of Appeal's conclusion, and the Florida Supreme Court's denial of discretionary jurisdiction, is completely correct. Respondents, Deborah Conner and Antonio Elzo, employees of the Department of Agriculture and Consumer Services (the "Department"),[1] had a reasonable basis to believe they were authorized to enter Vaughan's yard to look at leaves on citrus trees pursuant to a statutory grant of authority and the declared state of emergency regarding citrus canker in Florida. At the time the Department employees entered Vaughan's yard for this limited purpose, no Florida Court had contravened the statutory authority to conduct a warrantless search and, in fact, multiple Florida courts had recognized the exigent circumstances posed by citrus canker that required immediate inspection and tree removal. The Court should therefore deny the Petition.

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1. Although named as a defendant below, the Department is not subject to the issue on review pertaining to the right to sue the individual employees.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition because the law was not so well settled at the time the Department employees entered Vaughan's property that they should be denied qualified immunity and held individually liable for alleged Fourth Amendment violations.

When the Department employees entered Vaughan's property for the limited purpose of inspecting leaves on citrus trees, Florida law clearly authorized the limited intrusion due to exigent circumstances presented by citrus canker's onslaught. That a Florida state court years after the examination decreed that state authorities needed a warrant to inspect dooryard citrus cannot override qualified immunity.

STATEMENT OF THE CASE

The long battle fought by Florida's Citrus Canker Eradication Program ("CCEP") was reviewed by Florida's Supreme Court in *Haire v. Dep't of Agriculture*, 870 So. 2d 774 (Fla. 2004), citing *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 541-42 (Fla. 4th DCA 2001):

> Citrus canker was discovered in Florida in 1914 and eradication programs continued through the mid 1930s. In the mid 1980s, an Asian strain of citrus canker, xanthomonas axonopodis pv. citri., the strain of citrus canker at issue in this case, was discovered in Manatee County. It was considered eradicated in 1992 and the eradication program halted in 1994. However, in 1995 an outbreak was discovered around the Miami International Airport.

Citrus canker is a disease that is caused by a bacterial organism that attacks the fruits, leaves and stems of a citrus plant. It causes defoliation, fruit drop and loss of yield. It also causes blemishes on the fruit and a loss of quality. In severe cases, it can cause girdling of the stems and death of the tree.

Stem lesions can survive for many years and are capable of producing bacterial inoculum eight to ten years later. Although symptoms of citrus canker may be seen seven to fourteen days after infection, the maximum visualization does not occur until approximately 107 to 108 days after infection. This makes it difficult to control a disease which easily spreads through wind-driven rain or contamination of equipment or plant material.

* * * * *

At the time that citrus canker, Asian strain, was discovered in Miami, the citrus canker eradication program in place called for the destruction of trees that were infected or were within a 125 foot radius of an infected tree. The 125 foot radius was adopted in the 1980s as a result of a study conducted in Argentina. However, that study did not take into account what would happen in an urban setting.

In Miami-Dade County, the destruction of citrus trees within a 125 foot radius of an infected tree was not reducing the occurrences of citrus

canker. Therefore, the Department decided to initiate a study that would measure the distances that citrus canker, Asian strain, would spread in South Florida. The study kept track of over 19,000 trees in four sites and determined the distance between the diseased trees and the newly infected trees. The study showed that the eradication program which used the 125 foot radius was inadequate because it only captured about thirty to forty-one percent of infection that spread from a diseased tree.

The results of the study were presented at a meeting in Orlando attended by approximately twenty individuals and scientists. Those at the meeting examined the findings. After considering a range of distances between diseased trees and newly infected trees at the various sites, those present determined that in order to destroy ninety-five percent of newly infected trees, it was necessary to destroy trees within a 1900 foot radius of a diseased tree, thereby creating a buffer zone which would prevent citrus canker from spreading any further.

In March 1999, the Citrus Canker Technical Advisory Task Force, a body of regulatory individuals, scientists and citrus industry representatives who deal with the issue of citrus canker, unanimously recommended that the Department adopt a policy to destroy trees within a 1900 foot radius of a diseased tree in order to eradicate citrus canker.

Florida courts have wrestled with striking the right balance between fighting a virulent pathogen that threatens the State's citrus industry and affording citizens the highest possible measure of due process and access to judicial review.

The case at hand stems from Vaughan's assertion that the Department employees had no right to enter his yard and inspect his citrus trees without a search warrant. Whether the entry and tree inspection was constitutional is not at issue. The sole issue is whether the Department employees are shielded from individual liability by qualified immunity. At the time of the inspection, no Florida court had required a warrant for such inspections or declared such inspections unconstitutional. In 2003, however, years after the inspection at issue in this case, Florida's Fourth District Court of Appeal analyzed the warrant requirement and concluded that certain parts of a yard may be deemed curtilage and that the Department must procure a warrant to inspect trees for citrus canker. *Dep't of Agriculture v. Haire*, 836 So. 2d 1040, 1054-5 (Fla. 4th DCA 2003). Notably, the same Florida district court which ultimately held that Department employees were required to obtain a warrant in order to inspect dooryard citrus trees also affirmed dismissal of Vaughan's claim against the Department employees for violating his Fourth Amendment right to be free from unreasonable searches and seizures.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED DISMISSAL OF VAUGHAN'S COMPLAINT BECAUSE THE LAW REQUIRING THE DEPARTMENT TO OBTAIN WARRANTS TO INSPECT DOORYARD CITRUS TREES WAS NOT ESTABLISHED AT THE TIME OF THE ALLEGED FOURTH AMENDMENT VIOLATION.

Qualified immunity affords broad protection to "all but the plainly incompetent or those who knowingly violate the law." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990); *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989). Qualified immunity is evaluated by an objective standard. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1999). A government official proves that he acted within discretionary authority by showing objective circumstances which would compel the conclusion that the actions were undertaken pursuant to performance of duties and within the scope of his authority. *Id.* (citing *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)).

To defeat qualified immunity, Vaughan had to "prove the existence of a clear, factually defined, well recognized right of which a reasonable [government official] should have knowledge" and that a reasonable official would have understood that his actions would have violated that right. *See Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989).

When the Department employees entered Vaughan's yard for the limited purpose of inspecting leaves on citrus trees, they were entitled to rely on the statute authorizing such

inspections and the exigent circumstances surrounding the citrus canker emergency in Florida.

The Department employees had statutory authority to inspect Vaughan's property for citrus canker. Section 581.031(15)(a), Florida Statutes (2000), provided:

> The department has the following duties and powers: . . . to inspect plants, plant products, or other things or substances that may be capable of disseminating or carrying plant pests, noxious weeds. or arthropods, and for this purpose shall have power to enter into or upon any place. . . .

"Places" were defined to include "vessels, railroad cars, automobiles, aircraft, and other vehicles; buildings; docks; nurseries; orchards; and other premises where plants or plant products are grown, kept, or handled." Section 581.011(23), Florida Statutes (2000).

Qualified immunity operates to "ensure that before they are subject to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Following *Hope*, this Court narrowed qualified immunity to some degree, but did not undermine the protection from suit the doctrine provides. Under *Hope*, evaluating qualified immunity requires a Court to first determine whether a constitutional violation exists. If so, then the Court considers whether the contours of that right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 739. Under this analysis, an official must have "fair warning" that his or her conduct deprived the victim of a constitutional right. *Id.* at 739 (citing *United States v. Lanier*, 520 U.S. 259 (1997)). *Hope* narrowed the

scope of qualified immunity slightly by holding that prior case authority need not be materially similar in order to serve as fair warning that certain conduct violates a person's constitutional rights. *Hope*, 536 U.S. at 739. Critically, in *Hope*, the conduct involved basic human rights and dignity when prison guards tortured an inmate.[2]

But in the case at hand, unlike the conduct in *Hope*, the inspection of citrus trees in someone's yard constituted at worst a minimal intrusion that, to the Department employees, could not be perceived as a Fourth Amendment violation.

A. Respondents could reasonably believe that they were authorized to conduct a warrantless search because the Legislature, the Commissioner of Agriculture, and Florida courts had declared citrus canker to be a statewide emergency.

Vaughan relies primarily on *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), along with Fourth District Judge Gary Farmer's dissent, asserting that *Camara* put the Department employees on fair notice that their actions were unlawful. But *Camara*

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2. In *Hope*, prison guards chained a prisoner to a hitching post for seven hours, depriving him of water and food and taunting him as he suffered. The Court concluded that such treatment, which transpired after alleged misconduct by the inmate, served no true penal purpose and violated the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 738. Reversing the Eleventh Circuit's analysis and holding as too rigid, this Court determined that basic principles of fundamental human dignity need not be articulated by prior judicial authorities to provide fair warning to law enforcement officials that the subject conduct violated the Eighth Amendment. *Id.* at 738.

does not support a holding that the law was clearly established that warrantless searches under the CCEP were unconstitutional at the time of the inspection.

When the Department employees entered Vaughan's property, no Florida court had declared the applicable statutes or rules unconstitutional on Fourth Amendment grounds. Two circuit court judges did subsequently rule that warrantless searches were unconstitutional. One decision was vacated on appeal, and the other withstood scrutiny. *See Dep't of Agriculture v. Miami-Dade County*, 790 So. 2d 555 (Fla. 3d DCA 2001) (vacating trial court decision); *Dep't of Agriculture v. Haire*, 836 So. 2d 1040 (4th DCA 2003), *aff'd*, 870 So. 2d 774 (Fla. 2004). In *Miami-Dade County*, Judge Gerald Cope, concurring, opined that the Third District should address the warrant issue and intimated that a warrant is not required under the circumstances presented. As he wrote, "The County and the City appear to take the position that the entirety of a homeowner's yard qualifies as cartilage and that the Department cannot enter into any part of the yard without a search warrant. **That position is incorrect**." *Id.* at 559 (emphasis added). If an appellate judge on Florida's Third District Court of Appeal, in hindsight and with considerable deliberation, believed that a warrant was not required in every case when the Department inspected citrus trees on a person's yard, then it was reasonable for the Department employees in the field to believe that they were not violating Vaughan's Fourth Amendment rights when they conducted their inspection the prior year.

Furthermore, Vaughan's reliance upon *Camara* is misplaced because that landmark decision is factually distinct and contained exceptions to the warrant requirement, such that Respondents had good cause to believe that the Fourth Amendment did not prohibit their conduct.

Camara did not involve an emergency situation as is always present with a rapidly-spreading virulent disease. In *Camara*, an ordinance permitted city officials to enter "any building, structure, or premises" to "perform any duty imposed on them." 387 U.S. at 526. The intrusion in *Camara* was far more invasive because the statute allowed the entrance into a dwelling without any probable cause for inspection. *Id.* Here, the Department employees, in the midst of a plant disease emergency that provided probable cause, inspected only dooryard citrus, without entering any dwelling place.

Moreover, there are two exceptions to *Camara* where courts have dispensed with warrants for some searches. First, *Camara* recognized that exigent circumstances would obviate the need for a warrant: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law was traditionally upheld in emergency situations." The seizure of unwholesome food products or to prevent the spread of disease constitutes an exigent circumstance for which a warrantless search or seizure is appropriate. 387 U.S. at 539. This Court cited cases where the emergency involved unwholesome food and human disease. *See North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905) (compulsory smallpox vaccination). Even more compelling, this Court cited to a case involving a contagious animal disease: in *Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929), the Court recognized the need for immediate destruction of tubercular cattle. So, too, Florida law required the immediate destruction of a contagious plant pest that. *See* § 581.111, Fla. Stat. (2000) (defining "emergency" as "any situation in which the department has declared a plant pest or

noxious weed to be a public nuisance or when in the opinion of the department a plant pest or noxious weed endangers or threatens the horticultural and agricultural interest of the state").

The Florida Legislature, the Commissioner of Agriculture, and Florida courts characterized citrus canker as an emergency that required immediate action. In *Denny v. Conner*, 462 So. 2d 534, 536-37 (Fla. 1st DCA 1985), the First District Court of Appeal recognized that "the threat to the public interest in the citrus industry represented by citrus canker **is of sufficient gravity and urgency** that the effect of the immediate final order of the department should not be further stayed by this court" (emphasis added). *See Nordmann v. Florida Dep't of Agriculture*, 473 So. 2d 278, 279 (Fla. 5th DCA 1985) (approving the Department's emergency measures, and rejecting the owner's contention that the Department has "failed to show imminent danger justifying use of the state police power to destroy the trees"); *Sapp Farms, Inc. v. Dep't of Agriculture*, 761 So. 2d 347, 348-49 (Fla. 3d DCA 2000) (relying on *Denny* and upholding the Department's ability to remove trees exposed to citrus canker); *Dep't of Agriculture v. Sun Gardens, LLP*, 780 So. 2d 922, 924 (Fla. 2d DCA 2001) (recognizing the Department's finding of "possibly devastating effect of citrus canker on the citrus industry"); *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 542 (Fla. 4th DCA 2001); *Haire*, 836 So. 2d 1047-50 (recognizing Legislature's ability to protect citrus industry in agricultural emergency).

On June 15, 2000, in adopting amendments to the plant disease laws of Florida, the Florida legislature recognized the increasingly-acute nature of this emergency. The legislature made several findings:

- an **emergency exists** in the South Florida area regarding the spread of citrus canker, a bacterial disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit;

- joint state and federal attempts to eradicate citrus canker have so far been unsuccessful;

- despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County;

- if not eradicated quickly, citrus canker will spread to other parts of the state and **may destroy the citrus industry and dooryard citrus throughout Florida**;

- recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus trees will develop the disease from wind-blown rain or by other means.

See Ch. 00-308, Laws of Fla. (emphasis added). No court had challenged the Legislature's findings at the time the Department employees inspected Vaughan's trees. Accordingly, when the Department employees entered Vaughan's yard for the limited purpose of inspecting the trees at issue, they had a reasonable basis to believe that citrus canker posed an exigent circumstance that obviated the need for a warrant even if one was otherwise required.

Vaughan, relying upon Judge Farmer's dissent, suggests that no emergency existed because the situation "lacked any compulsion of fresh pursuit, loss of criminal evidence caused by delay, or any other recognized urgent circumstance. Unless citrus canker disappears in the time it takes to obtain a warrant, there is no conceivable reason not to require one." (Petition at 16). This argument is wrong because it assumes exigent circumstances capture only police searches for evidence of a crime.

Citrus canker was an emergency because it is a virulent plant disease that could spread any time rain fell and the wind blew, which is frequently in South Florida. The concern is therefore not whether citrus canker will "disappear" during the time it takes to procure a warrant, but whether the disease will spread and infect more citrus. To conclude that the Department employees should have treated the citrus canker situation as anything other than a serious emergency would have required them to disregard the Florida Legislature, the Commissioner of Agriculture, and multiple Florida courts which specifically categorized citrus canker as an emergency requiring immediate action.

B. The Department employees' conduct was objectively reasonable in light exception to the warrant requirement for traditionally regulated sectors of the economy.

Second, the status of citrus as a traditionally regulated sector in the economy of Florida made warrantless searches seemingly plausible. This Court had recognized that a search warrant is not generally required in state sectors that have been pervasively regulated and subject to close supervision and inspection. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307

(1978); *Blue v. Koren*, 72 F.3d 1075, 1080 (2d Cir. 1995) (extensive warrantless surveys and inspections valid regardless of motive because of strong governmental interest and pervasively regulated nursing industry); *United States v. Argent Chem. Lab, Inc.*, 93 F.3d 572, 574 (9th Cir. 1996) (warrantless search and seizure of veterinary drugs valid because of strong state interest in controlling misuse).

Agriculture, plant pests, and citrus have been pervasively regulated in Florida. *See generally* Chs. 570-604, Fla. Stat. (2000), Chs. 570 and 581; Chs. 5A-5L, Fla. Admin. Code, and especially Ch. 5B. The Florida legislature had authorized the Department to control and eradicate plant diseases. *See* § 581.031(7), (15), (17), Fla. Stat. (2000). Indeed, Florida had fought against citrus canker and other agricultural pests for many years, and agriculture, particularly disease-susceptible plants, have been regulated in Florida for over 100 years. *See* Fla. Const. of 1885, art. IV, § 20 (creating post of Commissioner of Agriculture); Ch. 581, Fla. Stat. (historical note documents creation of State Plant Board in 1927 to control agricultural pests); *Richardson v. Baldwin*, 124 Fla. 233, 168 So. 255 (Fla. 1936) (reciting duties of State Plant Board). The destruction of trees infected or exposed to citrus canker, under the power conferred in the Florida Statutes, was recognized by the Florida Supreme Court after the initial 1985 outbreak of canker in this state. *Dep't of Agriculture v. Polk*, 568 So. 2d 35, 37-40 (Fla. 1990).

In order for warrantless administrative search to be reasonable, there must be a substantial state interest behind the regulatory scheme; the search is necessary to further that scheme; and the authorizing statue is an adequate substitute for the warrant requirement in giving notice to owners and limiting discretion of those conducting the search. It was not

clearly established that warrantless citrus canker inspections did not fit within this framework at the time the Department employees inspected Vaughan's trees.[3]

II. THIS COURT REJECTED CERTIORARI JURISDICTION OVER A CASE ARISING OUT OF SIMILAR CIRCUMSTANCES AND UPON WHICH THE FOURTH DISTRICT BASED ITS DECISION.

In the Fourth District's Opinion, the majority of the panel relied upon *Grimm v. Spell*, Case No. 2:00-CV-506-FTM-29DNF (M.D. Fla. July 3, 2003) (Petitioner's A-4). Just as in this case, the Department employees in *Grimm* entered

3. *See New York v. Burger*, 482 U.S. 691, 702-704 (1987) (warrantless search of automobile junkyard valid because conducted pursuant to statute, necessary to further state interest in detecting stolen cars, and discretion of officer conducting the search limited); *Showers v. Spangler*, 182 F.3d 165, 172 (3d Cir. 1999) (warrantless administrative search of taxidermist's business would be valid if taxidermy were pervasively regulated business); *United States v. Cobb*, 975 F.2d 152, 156 (5th Cir. 1992) (warrantless administrative search of trucking company justified because part of company's business included pervasively regulated motor vehicle salvage operation); *United States v. Branson*, 21 F.3d 113, 116 (6th Cir. 1994) (warrantless administrative search of auto repair shop valid because of business' statutory regulation); *LeRoy v. Illinois Racing Bd.*, 39 F.3d 711, 713-14 (7th Cir. 1994) (warrantless administrative search of racehorse owner's automobile at race track valid because horse racing pervasively regulated industry); *Schwartz v. Pridy*, 94 F.3d 453, 457 (8th Cir. 1996) (warrantless administrative search justified because auto parts industry was pervasively regulated); *Winters v. Board of County Comm'rs*, 4 F.3d 848, 853 (10th Cir. 1993) (warrantless administrative search of pawn shop valid because pawnshops are pervasively regulated); *Moore v. State*, 442 So. 2d 215, 216 (Fla. 1983) (warrantless administrative searches of automotive repair shops constitutional).

the plaintiff's yard to inspect citrus trees before any Florida court imposed a warrant requirement. In *Grimm*, the federal district court ruled that qualified immunity shielded Department employees, who entered a homeowner's yard to inspect citrus trees, from personal liability. The Eleventh Circuit Court of Appeal affirmed the decision, and this Court denied certiorari jurisdiction. (*Grimm v. Spell*, Case No. 04-168, *cert. denied*, 543 U.S. 999 (2004)). Grimm is indistinguishable from this case.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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